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II

The Jury, Seditious Libel, and the Criminal Law



THOMAS A. GREEN

THE SEDITION LIBEL TRIALS of the eighteenth century constitute an important chapter in the history of freedom of the press and the growth of democratic government. While much has been written about the trials and about the administration of the criminal law in eighteenth-century England, little has been said about the relationship between the libel prosecutions and the more pervasive and long-standing problems of the criminal law.¹ We have perhaps gone too far in positing—or simply assuming—a separation between political high misdemeanors and common-run felony cases such as homicide and theft. For there were points of contact between the two: most notably, the trial jury was employed in both. It may be that the use of the jury in the one kind of case influenced thinking about how it ought to be used in the other. I shall explore this subject in the light of the tract literature of the seditious libel crisis. I hope to elucidate the oft-repeated arguments concerning the jury's right to decide law as well as fact, an alleged "right" that meant different things to different writers, and to say something about the kinds of knowledge that these pro-jury writers thought jurors were to bring to their task. Finally, I shall set forth some tentative conclusions concerning the place that the seditious libel episode and its resolution had in the history of the jury and the administration of criminal law.²

By the time of the seditious libel crisis two strands of jury law-finding theory remained intact, one active, the other largely historical. A long-standing tradition in common-run cases of merciful acquittals and "partial" verdicts against the facts actually proved (for example, petty larceny instead of grand larceny, manslaughter instead of murder) continued apace with something close to official acquiescence. Although true nullification of judicial instructions (as opposed to *ad hoc* merciful verdicts that did not reflect repudiation of the law) was not officially approved, some very respectable jurists not only lauded the nullifying behavior of juries in some pre-1689 political cases but, more significantly, could be read as suggest-

ing that there might be occasions on which juries would once again be duty bound to play that role.

The seditious libel tracts reflect the influence of these strands of thought in a variety of ways. Especially, they reveal both the extent to which the radical jury proponents were able to build upon the views of the more conventional, establishment, writers and the importance of the interplay between notions of true nullification in political prosecutions and the tradition of merciful verdicts in common-run cases. After briefly describing the seditious libel controversy (section 1) and the historical development of jury trial (section 2), I shall examine these themes, among others, in the course of considering, first, varying views of the constitutional role of the criminal trial jury (section 3) and, second, the tract writers' approach to finding law (section 4), finding fact (section 5), and applying law to fact (section 6). My conclusion (section 7) puts the seditious libel controversy into historical perspective regarding the social, political, and legal aspects of the institution of trial by jury.

1

The common-law crime of seditious libel consisted—broadly speaking—of the intentional publication of a writing that “scandalized” the government, that is, tended to bring it into disesteem. Although indictments for seditious libel generally alleged that the accused had acted “falsely, seditiously, maliciously, and factiously,” the courts, as Holdsworth states,

laid it down that . . . the offence consisted of the intentional publication of a document with the seditious or defamatory meaning alleged by the prosecution. . . . [T]he function of the jury was limited to finding these two sets of facts; . . . it was for the court to say as a matter of law whether a writing published with this seditious or defamatory meaning was a libel.³

Thus, the jury was to render what amounted to a special verdict (that is, a verdict stipulating the specific facts the jury had found) in the form of a general verdict of "guilty" if it found that the accused intentionally published the writing and if it found that the writing bore the meaning alleged by the prosecution.

The official doctrine, which Star Chamber had originated and transmitted to the common law, did not recognize truth as a defense.⁴ Moreover, it assigned to the court as a matter of law two questions that had the appearance of questions of fact: whether the act was done with criminal intent, and whether the writing was seditious or defamatory. It was perhaps plausible to consider the latter question one of law because the nature of the crime typically meant that the entire record of the allegedly criminal act was embodied in a physical specimen that survived for judicial inspection. It was less plausible to cast the question of criminal intent—or maliciousness—as one of law, to be inferred by the court. On both counts, the official doctrine was strongly resisted, from the Restoration trials of Carr⁵ and Harris⁶ in 1680 and the great case of the *Seven Bishops* on the eve of the Glorious Revolution⁷ down to the reform of the doctrine by means of Fox's Libel Act in 1792.⁸

We may note briefly the major phases of the seditious libel debate in the eighteenth century. From the perspective of nearly all participants in that debate, the *Seven Bishops' Case* had taken on the garb of hallowed precedent. For nearly all writers that great courtroom drama represented an act by the people which paved the way for the constitutional settlement that followed the Glorious Revolution of 1688–89, wherein Englishmen consigned the law to its rightful place—the protective arms of an independent judiciary.⁹ The case, which was tried in a highly charged political atmosphere, involved the prosecution of seven bishops who refused to read James II's Declaration of Indulgence in their churches. Because the bench divided on the question of whether the petition consti-

tuted a libel, that question was left, *de facto*, to the jury.¹⁰ The acquittal of the bishops was taken to be both a rejection of James's pro-Catholic policies and a vindication, against the views of the bench, of the jury's right to determine the questions of intent and libelousness. The *Seven Bishops' Case* became a precedent for opposition to tyranny, an act of last resort: jury nullification of the law (that is, the official doctrine of seditious libel, on which the bench had not *una voce* insisted) to save the constitution. Yet for some, this did not require rejection of the Stuart doctrine of seditious libel. An independent and impartial bench could be trusted (or so the theory ran) to assign and determine all questions of law. Thus, in the century after the Glorious Revolution, much of the legal establishment both accepted the constitutional settlement and adhered to the essential elements of the Stuart law of libel.¹¹

For many others, however, the *Seven Bishops' Case* stood for more. It was a vindication of the integrity of the general verdict. For some this meant only that the traditional role of the trial jury, the finding of fact and the application to fact of the law as given by the bench, was preserved. Others, as we shall see, envisioned the general verdict as including not merely application of the law but also true law finding.

From the outset the eighteenth-century debate concerning the seditious libel doctrine was couched largely in Restoration terms. Chief Justice Raymond, relying heavily on the formulation of his predecessor, Chief Justice Holt, restated the official doctrine (outlined above) succinctly in *Rex v. Franklin* in 1731, setting forth a division of judge-jury responsibilities that the courts would attempt to effectuate until the passage of Fox's Libel Act.¹² His opinion, in turn, revived the Restoration defense of the criminal trial jury. In 1732, John Hawles's 1680 tract *The Englishman's Right* was reprinted for the first time. The new preface, signed by one J. K., warned of developments that threatened to destroy all that had been won in the Glorious Revolution and commended the tract "in which

the original design, duty and power of jurors are so clearly explained, that it will be sufficient to instruct all those, who shall, on these occasions, have the lives and properties of their fellow-subjects in their hands.”¹³ In the tract itself, Hawles argued that in all cases, including libel, juries were the true judges of law as well as of fact, not simply that, in libel, seditiousness and intent were matters of fact for the jury.¹⁴

After Franklin’s trial the contest over the doctrine of seditious libel falls into three principal stages. In 1752, the Crown tried by special jury (frequently the practice in seditious libel cases) a bookseller named William Owen for the sale of a tract critical of the House of Commons.¹⁵ Chief Justice Lee, on the urging of the solicitor general, William Murray (the future Lord Mansfield), charged the jury in accordance with Raymond’s statement of the law. The jury, after hearing testimony regarding Owen’s character and loyalty to the Crown and Camden’s argument that the right to criticize Parliament was fundamental, acquitted the defendant. Underlying Camden’s argument for the defense was the principle that, notwithstanding the bench’s view of the law of seditious libel, unless the jury was convinced that the allegations of falsity and scandalous intent in the indictment had been proved, it must acquit.¹⁶

The second stage in the English government’s use of seditious libel laws to silence criticism of its policies began in 1763 with the prosecution of John Wilkes for his famous number 45 of *The North Briton*¹⁷ and ended in 1770 with the prosecution, on informations *ex officio*, of those who published and sold the “Junius” letter protesting the official policy toward the American colonies. Mansfield, as chief justice of King’s Bench, enunciated the established law of seditious libel in the trials of the bookseller John Almon¹⁸ and the publishers Henry Woodfall¹⁹ and John Miller.²⁰ Glynn, who defended all three, followed Camden’s arguments in *Owen* almost verbatim. The Crown obtained a conviction in the case of Almon. The Wood-

fall jury returned a verdict of "guilty of printing and publishing only," which forced a judicial order for a new trial that was never held. At the close of Miller's trial, the jury returned a verdict of "not guilty" despite clear evidence of publication.

These widely publicized "Junius" trials and Mansfield's consistent refusal to charge the jury that it should consider the question of criminal intent provoked debate in Parliament over the seditious libel law. Glynn introduced the question of reform in the Commons;²¹ Camden and Chatham supported him in the Lords.²² They could not, however, agree on a new formulation. On the other side, opponents of reform raised the specter of jury control over the law and of the dissolution of judicial authority.²³ Some twenty years would elapse before sufficient support could be mustered to pass a bill giving the jury the right to return a general verdict.

The third stage of the seditious libel crisis commenced with the trial in 1783 of William Shipley, Dean of St. Asaph.²⁴ Unquestionably, Shipley's case was the most important seditious libel prosecution since the *Seven Bishops' Case*. Shipley published a tract by his brother-in-law, Sir William Jones, that allegedly incited to rebellion;²⁵ after he was convicted with a verdict of "guilty of publishing only," a new trial was refused despite Thomas Erskine's ringing defense on Shipley's behalf. Yet after carrying the day on the law of libel, the bench set the conviction aside for a defect in the indictment.²⁶

Mansfield won the battle, but he soon lost the war. The campaign against the seditious libel law greatly intensified. Erskine was lionized, and his cause was espoused in tracts, in the press, and, finally, in Parliament.²⁷ Fox's Libel Act, passed in 1792, did not convert the questions of intent and seditiousness into questions of fact but did state that in trials for seditious libel,

the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue . . . and

shall not be required or directed . . . to find the defendant or defendants guilty, merely on the proof of the publication . . . and of the sense ascribed to the same. . . .²⁸

The “whole matter” included the question of the existence of criminal intent, which almost always had to be inferred from the nature of the publication itself, and the question of whether the writing was seditious. The statute affirmed the jury’s right to return a general verdict. It was clear that in doing so the jury would necessarily have the right to apply the law (regarding criminal intent and seditiousness) as stated by the bench; that the jury possessed the right to reject the law as stated by the bench was neither stated nor implied. That it might do so, in a concealed fashion, was undoubtedly understood—and (by many) feared.²⁹

2

Arguments over the jury’s role in the more spectacular political cases had always been colored by perceptions of its role in the daily administration of the criminal law. Thus, to understand the place of the seditious libel debate in eighteenth-century law and politics, we must consider some aspects of the history of the criminal trial jury. Specifically, we must consider how two main eighteenth-century concepts of jury law finding emerged out of age-old jury practices.

The English criminal trial jury emerged during the final stage of the first great revolution in English criminal law, the series of changes traditionally associated with Henry II and his immediate successors. Over the course of the twelfth century, and most dramatically during the last quarter of that century, the criminal law was transformed from a private, compensation-based system of law into a public and—at least at the felony level—capital system of law.³⁰ The Crown had from the outset sought lay cooperation in effectuating its policy. Trial on

the king's suit, leading to execution at the hands of the Crown, was set in motion by the procedure of presentment. It may be, though we cannot be certain, that the lay presenters resisted strict application of the new system of criminal law.³¹ After the abolition of the ordeal in 1215, the English adopted a system of community-based fact finding to act as a method of proof. Almost immediately community resistance to the strict application of the formal legal rules became visible. For several centuries there was little to impede this. The trial jury, self-informing and thus free to decide what constituted evidence, was able to impose its concepts of liability upon the administration of the criminal law. Many who slew out of sudden anger were acquitted or said to have acted in self-defense; many simple thieves were saved from the gallows by acquittal.³² We cannot determine the extent of official acquiescence in this *de facto* jury law-finding process. We may only suppose that authorities devoted more of their limited resources to combating truly corrupt jury practices in cases involving professional criminals than to contesting merciful jury verdicts in cases involving relatively marginal offenders.

The first important transformation in the history of the criminal trial jury dates from the fifteenth and sixteenth centuries. It was associated with the rise of official prosecution practices. Justices of the peace began to play an active role in gathering evidence that might be used in court to substantiate indictments that they had taken and that assize clerks had carefully reframed.³³ As this happened, the trial jury gradually lost its self-informing role although it retained its role of assessing evidence and of rendering a verdict. While the jury had not lost its power to nullify rules of law, the increasingly public nature of the flow of evidence cost the jury some of its power to conceal from the bench the degree to which an acquittal—or for that matter a conviction—was based, not on strict application of law to fact, but on a sense of justice or some form of favoritism.³⁴ Although the rise of the prosecution made it possi-

ble for officials to monitor jury behavior—and, if they so chose, to bind over to Star Chamber even the merciful jury³⁵—constraints of time, administrative capacity, and interest put the jury at greatest risk in those cases the Crown considered most serious. Thus, in the “middle period,” the bench used the available official machinery of jury discipline to the fullest in some instances and allowed—even encouraged—age-old community-based practices to continue in others.³⁶

Perhaps inevitably, the political opposition in the former instances came to articulate a theory of jury law finding, to argue not only that it was legitimate but also that it was integral to the right to trial by jury. The Interregnum and Restoration saw the writing of a good deal of bad history: *de facto* law-finding practices in common-run felonies were construed as *de jure* and generalized to all criminal cases. The basis for the jury’s *de jure* right to find the law was discovered in Anglo-Saxon liberties and in post-Conquest resistance to the Norman judiciary’s attempts to undermine true English justice. From Lilburne’s 1649 trial to *Penn’s Case* in 1670, and beyond, arguments concerning the original rights of English juries occupied an important place in English democratic writings.³⁷

The Leveller and Quaker law-finding theories never really took hold, but they remained embedded in English resistance theory and were, during the later years of the Restoration, appealed to by some of those who opposed the official doctrine of seditious libel. They helped to form the ideological support for what we may call the true law-finding, or nullifying, role of the jury—its asserted duty to nullify the law in cases involving executive or judicial tyranny.³⁸

Because these theories presumed the possibility of conflict between the jury and the bench, they must be distinguished from the older and dominant, but much more modest, law-finding theory of the criminal trial jury. According to that theory, the jury as the final determiner of fact applied the law more or less as stated by the bench but might, through its abil-

ity to find facts or even at the behest of judges, mitigate the rigors of the law in appropriate cases. But this theory, which captures the nature of the period's modest *de facto* practices, was never official doctrine, and the practices it approves of were never unreservedly acquiesced in by the bench. The courts, we have seen, episodically (though only rarely) punished juries for modest leniency by binding them over to the Court of Star Chamber; after the abolition of Star Chamber in 1641 they imposed fines upon juries that rendered what the bench thought of as unjustified acquittals.³⁹ *Bushell's Case* in 1670 marked the end of such coercion.⁴⁰ In his famous opinion, Chief Justice Vaughan held that jurors could not be fined for acquitting against the weight of evidence because they alone had the responsibility to find the facts and the court could never know completely how they saw them.⁴¹ Vaughan's opinion, though it grew out of a political case wherein the defendants had invoked the jury's right to find law,⁴² did not sanction nullification—not even the modest, merciful practices that the non-coercible jury might (thanks to his opinion) have felt free to implement. Within a decade, however, in response to the Harris and Carr seditious libel prosecutions, anti-Stuart writers (including John Hawles) had glossed Vaughan's opinion and it had entered the jury literature, much revised, as a powerful argument for the jury's right to nullify the law—not only to be merciful in common-run cases but also to overturn what it regarded as unlawful judicial instructions in prosecutions for treason, seditious libel, or other essentially political offenses.⁴³ These ideas appear to have gained some ground even among the establishment opposition to James II.

However the anti-Stuart Whig leadership may have felt about the more far-reaching jury law-finding rhetoric, once it had come to power in 1689 it argued that the constitutional settlement, and especially the establishment of judicial independence, had rendered true jury nullification—nullification of judicial instructions—unnecessary. Yet that same Whig re-

gime acquiesced in a great deal of jury mitigation of capital sanctions—merciful application of the law—in common-run cases.⁴⁴ Substantial penalties, such as the quasi exile of transportation, now existed for lesser offenses so that partial mitigation did not seriously flout the king's justice or threaten popular security.⁴⁵

Although authorities acquiesced in such practices and even, as some historians have argued, turned them to their own advantage—that is, by being seen to act mercifully, they engendered the deference of those they ruled⁴⁶—many jurists and lay observers (including some political radicals)⁴⁷ came to doubt the deterrent effect—and hence the wisdom—of a system of criminal law that corrected for the inhumanity of its prescribed sanctions through *ad hoc* recourse to dispersed powers of mitigation. Henry Fielding, at mid-century, and then Blackstone, Eden, Romilly, and others in later decades, condemned the prevailing system.⁴⁸ They argued for a reformed, humane, and effective law of sanctions, one that was moderate and proportional and that could be applied with certainty. Mitigation, they conceded, could never be entirely dispensed with, but what little would be required should be centered in the Crown's pardoning power. The role of the jury would be to find the facts. If it did so mercifully, it would be merciful in the sense of extending the benefit of the doubt in close cases, not in the sense of mercifully acquitting a defendant who on the evidence was clearly guilty.⁴⁹

Not surprisingly, however, these critics distinguished between the reformed future and the unreformed present: so long as the law of sanctions remained overly severe, widespread mitigation, they recognized, was both inevitable and just, a lesser evil, a form of “pious perjury.”⁵⁰ Beginning with a critique of jury mitigation, the penal reformers ended by providing its existence *pro tem* with an important element of justification. And in yet another way the penal reform writers—and indeed many others—lent support to the propo-

nents of jury discretion, by recognizing the historic role of the jury as a bulwark against tyranny, especially in political cases. Though virtually all of them believed that this far-reaching form of nullification was no longer likely to be necessary, they were willing to pay lip service to this ultimate constitutional role of the criminal trial jury,⁵¹ as were, indeed, some members of the bench.⁵²

3

The post-1750 discussion of the constitutional role of the criminal trial jury was pervaded by arguments that drew upon history. Virtually all commentators on the jury were convinced of the pre-Conquest origins of the jury. A few writers searched for its prototype in the classical world;⁵³ some traced the jury to the Goths;⁵⁴ most posited a Saxon origin, identifying the early *laggmanni* as combining the roles of judge and jury.⁵⁵ For the most part, however, this fascination with the earliest period of the jury remained an antiquarian exercise. It is true that eighteenth-century jury proponents thought that the jury's antiquity bolstered its place in the constitution, but no one disputed that the jury deserved some place. Exactly what place the jury ought to have was the question on which contemporaries disagreed. Here the eighteenth-century theorists had little in common with their mid-seventeenth-century forerunners. Few of the later writers contended, as had some Levellers, that historically the jury had preceded the judiciary or that the law flowed forth from the community through the jury. Whatever their perspective on the law-finding power of the jury, the eighteenth-century writers reflected an implicit acceptance of a Lockean view of the origins of civil society. They took for granted the quasi balance of powers created by the settlement of 1689 and the dominant role of Parliament in the making of law. The jury, even in the view of most of those who favored jury law finding, was supposed to guarantee that

English law, whether common law or statutory law, was fairly stated and fairly applied.

For some eighteenth-century jury proponents the jury was not so much a part of the constitution as a symbol of the source of power that created civil government and the constitution itself. Henry Burtenshaw maintained that the jury are not

the creatures, even of the constitution, but coeval with it—with the constitution which declares all power to be in the people, and which has survived and remained unviolated through many revolutions of state government: they are themselves a government in miniature, and a symbol of that general democracy in which resides, and through which, under various modifications, is dispersed, all the functions of power, of justice and of policy.⁵⁶

But even Burtenshaw recognized that laws were made in Parliament or “abroad, by [the people’s] habits of life and usages,” so that the jury, in his view, was to “interpret those laws when made.”⁵⁷ Most commentators took an even more frankly instrumental view of the jury: the jury was a part of the constitution, established in order to fill a gap or to balance lay against official influence. Blackstone lent important support to this watchdog theory of the criminal trial jury. He cautioned against creation of more “convenient” procedures; the “delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters. . . .”⁵⁸ Despite ambiguity in its characterization of the jury’s role, Blackstone’s theory strongly implied that the jury remained a safeguard against some future recurrence of executive or judicial tyranny.

Blackstone’s contemporary Henry Dagge traced the origins of civil society in terms familiar to eighteenth-century political theorists. He began with a discussion of man in his natural state and with a depiction of the resolution of dispute by private revenge; this period of continual strife, he asserted, gave

way to government and, eventually, to the creation of distinctive elements of government: legislative, executive, and judicial. Even at this stage, "after the three powers were divided," difficulties remained:

The judicial power being entrusted with the exposition of the law, and as it depended on their judgment whether the case or fact *sub lite*, was or was not within the description of the law, here was evidently a great latitude still left for the exercise of partiality or oppression.⁵⁹

The "remedy," he concluded, was "the invention of juries."⁶⁰ Dagge assured his readers that it seldom happened that juries rejected the judge's instructions: "The opinion of the bench has generally its due weight."⁶¹ For the most part, the jury was to find fact and no more, and the better the primary institutions of government worked, the less the jury would be needed as a safeguard of the liberties those institutions were designed to protect. This view of the jury was adumbrated even by William Paley, who exhibited tolerance for a complex, sometimes unpredictable, legal process. In his view, there would and ought to be countervailing pressures, from which an equitable solution would emerge. The jury's role could not be given clearly defined limits; thus Paley cautioned against "urging too far the distinction between questions of law and matters of fact."⁶²

None of these prominent academic legal writers directed his attention specifically to the debate resulting from trials for seditious libel. Indeed, none set out to write mainly about the jury. Rather, each developed a distinctive approach to the legal system generally, fitting the jury into the larger scheme of things. None subscribed to a far-reaching theory of endemic jury law deciding, but all believed—or strongly implied—that, for the legal system to operate fairly, recourse to jury monitoring of judicial instructions on the law would sometimes be necessary. This conception of the jury was of course shared—

and fruitfully used—by most writers who wrote in response to the government's doctrine of seditious libel. For these latter writers, however, the jury was not incidentally, but rather in the main, a safeguard against oppression.

Robert Morris, the Wilkite barrister, sounded a theme to which many of Mansfield's opponents rallied when he wrote: "The great province of a jury in criminal matters is to make true deliverance of the subject from false accusation, and especially from oppressive prosecutions of the Crown."⁶³ The jury, Glynn was quoted as stating at the trial in 1770 of the publisher John Miller, is "in times of danger the asylum of the people. . . ."⁶⁴ It was to protect "every subject of the state, from the abuse of executive power," wrote Thomas Leach, that the English constitution required "the unanimous suffrage of twelve of his equals."⁶⁵ Judges, who were still dependent upon the Crown for "pensions" and "places, which they hold at the mere pleasure of their minister,"⁶⁶ were not above "crafty distinctions and ensnaring eloquence"; they "throw dust in the eyes, and confound the sense of a well-meaning jury. . . ."⁶⁷ Such invective became commonplace in the years between the Wilkes affair and the Dean of St. Asaph's trial.

The encomiums of the more radical supporters of the jury typically began with generalities from Hale or Blackstone and went on to the limits of their authors' imaginations. Jury trial was, for example, central to "the grand or principal law of this land, on which the justice of all the rest depend. . . ."⁶⁸ It was through the jury that subjects judged "when the fundamental laws are violated; when an attempt is made to subvert the constitution."⁶⁹ Even the charges that jurors lacked legal training, were just plain ignorant, or were subject to popular passions were occasions for praise, albeit at times with a defensive tone. Jurors, it was frequently said, did not lack the natural capacity for the role they were being asked to play. They have, wrote Manasseh Dawes, "generally a just sense of right or wrong."⁷⁰ "Juries have not a knowledge of the technical niceties of the

law, as a profession,” Capel Lofft conceded, “but the Constitution presumes them to understand it as a rule of civil rights in a general sense.”⁷¹ “Thanks be to God!” Anthony Highmore exclaimed, “there lives in mankind a sense of right and wrong that compels them to form the most impartial judgment they can. . . .”⁷² All three of these writers were trained in law; all opposed one or another Crown policy; and all resented use of the libel laws to silence criticism.

A general sense of civil rights and a sense of right and wrong were required, but not deep grounding in Scripture, custom, or the common law. For some, this was the irreducible core which law-finding theory had reached by the late eighteenth century. So long as law deciding was linked to “pious perjury” or to egregious cases where the jury was required to stand as a bulwark against judicial overreach, even the moderate, bench-oriented Blackstone could be put to some use. George Rous, yet another Wilkite barrister, quoted Blackstone’s admonition to subjects that they learn the law; their lack of such learning, Blackstone had written, “has thrown more power into the hands of judges to direct, control, and even reverse, their verdicts, than perhaps the constitution intended.”⁷³

Some who supported the law-finding jury conceded that juries might make too much of their powers or misunderstand how they ought to be employed. Rous, for example, wrote: “Jurors, like judges, may err through ignorance, or be misled by passion.”⁷⁴ But, he concluded, the constitution wisely contained a remedy—where, that is, a jury wrongly convicted the defendant. Drawing, as did many other tract writers, upon practice in common-run felonies, Rous asserted that “grace is always extended to the prisoner upon a proper representation from the judge. A refusal would be contrary to the duty of a sovereign, who swears, at his coronation, to execute justice in mercy.”⁷⁵ In the case of seditious libel, however—at least before 1792—the government feared what it viewed as unwarranted acquittals, not unwarranted convictions. Those radical

pro-jury writers willing to face this problem manipulated the language of the moderates Dagge and Blackstone, characterizing truly unwarranted acquittals as a “lesser inconvenience”⁷⁶ and retreating to the well-worn maxim that it was better that many guilty men went free than that one innocent man was convicted. However tolerable this maxim may have been in cases of manslaughter or petty theft, it was unlikely that authorities would be content to apply it to cases involving government critics.

4

Only a minority of pro-jury writers who addressed the problem of seditious libel dealt openly and at length with the further reaching of the two theories of jury right, true law finding: the jury’s alleged right to reject an indictment, regardless of the judge’s instructions, on the grounds that it failed to charge the defendant with a crime. Those who advanced this position drew directly upon the late seventeenth-century tracts by Hawles, Care, and the anonymous author of *A Guide to Juries*, all of whom had, in turn, drawn upon claims made by Lilburne and Penn. Perhaps the strongest version of this argument was the statement of the printer and bookseller Joseph Towers:

It cannot be supposed . . . that any jury should be arbitrarily directed to bring any man in guilty, when they are not convinced in their own minds, whether the action the accused person is charged with be a crime or not . . . not only whether he has been guilty of the action alleged against him, but whether he has been guilty of a crime.⁷⁷

The most offensive aspect of the seditious libel doctrine—so far as pro-jury writers were concerned—was that truth was not a defense; moreover, the prosecution did not have to prove that the alleged libel in fact brought the government into disre-

pute or created an imminent threat to public order, even though indictments for seditious libel alleged that the defendant had published certain statements "seditiously" and "factiously." Thus one writer, who reproduced some ten pages of Hawles's famous tract, concluded in his own terms:

From all which it is evident, that however heinous a fact may be represented by hard work and artful innuendoes in an indictment or information, the jury may with impunity, and ought in conscience to bring in the general verdict, not guilty, not only when they think the fact has not been proved by sufficient witnesses, but also when they think the fact is not such a heinous fact as is charged in the indictment or information.⁷⁸

Another writer made the point in his comments upon the Penn-Mead trial of a century earlier:

As the jury were not convinced, that the fact, with which Penn and Mead were charged was in itself a crime, they were unwilling to condemn them; though, attending to the matter of fact only, they could not avoid it, because the fact was fully proved. . . . [I]t is plain, the jury had respect, in their last verdict, entirely to the matter of law. For as they were convinced, that Penn and Mead had not been guilty of any criminal or illegal action, they could not honestly and conscientiously do anything but acquit them.⁷⁹

In their arguments for true law-finding powers, jury proponents looked for support to the rules of criminal procedure and to the nature of the substantive criminal law. Most of the arguments devolving from procedure touched upon the supposed theoretical liability of the jury to an attaint. Although this ancient procedure had probably never been applied in criminal cases,⁸⁰ most eighteenth-century jury proponents referred only to its "disuse," drawing the conclusion (perhaps from Restoration tracts) that attaint, like the fining of jurors, had

once been, but was no longer, permitted by English law. The original law of attain, they asserted, must have assumed the right of juries to decide law as well as fact, for attain had applied only in those cases where the jury had found "bad" law.⁸¹ *A Treatise on the Right of Juries* (1771) carried this analysis one step further: the fact that since *Bushell's Case* the law had supplied no certain means of controlling jury verdicts (at least in the case of an acquittal) proved not only that the jury had the power but also that it had the right to find law.⁸² Even Justice Willes, who voted with the majority in *St. Asaph's Case*, found this argument persuasive.⁸³ On the eve of Parliament's consideration of the Libel Act, his views were rephrased by Thomas Leach, a barrister and police magistrate, who wrote:

In the institutions of civil government, power and right, are, and must be, convertible terms. Civil power, and civil right, are the mere creatures of the law and know no other limits, than the law imposes upon them. The law speaks the language of prohibition, not of admonition. What it permits to be done, uncensured, and confirms, when it is done, it has delegated the power to do, and the exercise of that power, is of right.⁸⁴

Similarly, pro-jury writers argued that the theory of the special verdict presumed that juries had a valid law-finding role. A jury could render a special verdict in a case if it doubted the validity of a certain application of the law to the facts.⁸⁵ If the jury had no such doubts, it was therefore said, the jury might find law as well as fact.⁸⁶ This argument, however, established nothing more than that juries applied law to fact. The law might still be said to have been taken from the bench, a point that many tract writers well understood. Finally, many writers cited the practice of defense counsel in seditious libel cases to support the proposition that juries had the right to consider questions of law. The bench frequently allowed counsel to argue points of law to the jury or even to question the validity of the official doctrine of seditious libel in their summations.⁸⁷

Yet arguments that relied upon the nature of criminal procedure and trial practice were entirely too fragile to support a far-reaching claim to jury law finding. The attain issue was dead (indeed, it had never been a live consideration in criminal cases); the existence of special verdicts, it could be countered, proved only that in some cases the jury had doubts concerning a very restricted "law-applying" role. As for the leeway allowed counsel in their summations, such judicial leniency was hardly a sound foundation for the construction of a matter of jury right. Few laymen understood criminal procedure sufficiently to appreciate what were, in any case, tepid rejoinders to Mansfield's dissertations on the ever-growing body of precedent.

Of greater importance—though, in logic, equally limited—were arguments based upon the nature of the substantive criminal law, not only in political cases but in common-run cases as well. The criminal law, it was stated, was "within reach of the plainest understanding."⁸⁸ Such claims, it is true, were only a pale reminder of mid-seventeenth-century assertions concerning the relationship between criminal law and the Scriptures; nor was it the point that the common man could know the law merely by examining his heart. But the criminal law *was* knowable. The entire system of criminal justice assumed as much:

To say the truth, one could hardly imagine a more extravagant absurdity, than to hold, that a criminal shall not remove the imputation of guilt by pleading ignorance of the law; and yet, that a jury who try him have no capacities to judge of that law.⁸⁹

The logical conclusion of the argument that only the bench and bar possessed the ability to understand the law, it was said, was that "we may daily transgress without being wilfully guilty."⁹⁰ The robber, the sneak thief, the slayer—they knew the law as it applied to them. The point was frequently repeated, always with a certain tone of astonishment: If the jury

was not to decide law because men of their station lacked the necessary understanding, then the rationale for the official doctrine of seditious libel was inconsistent with the requirement of *mens rea*.⁹¹ The analogy to common-run cases—to the common suspect, the “daily transgressor”—lent force to the point, but, at the same time, the line of argument here involved did not ground a true law-finding theory. To say that the jury possessed the ability to apply the law was not to say that the law they were to apply was “found” by them rather than set forth by the bench.

5

For many commentators the issues of freedom of the press and, more generally, of the subject's right to criticize the government were more important than the jury question. The jury was significant, not as an end in itself, but as a safeguard against what were seen as the government's interested and abusive prosecutions. Arguments asserting that the jury was the protector of liberty were made both by those who conceived of the jury primarily as a fact finder and by those who adhered to one or another variant of law-finding theory. Distrust of the government did not commit one to any particular conception of the jury. Yet the doctrine of seditious libel posed a special sort of problem. By drastically reducing the scope for factual determinations, the doctrine placed the defendant's fate almost wholly in official hands. To assert the jury's right to play its traditional fact-finding role required an attack on the libel doctrine itself. Hence, all appeals to the jury necessarily contained an express or implied demand that the jury reject the bench's instructions regarding the allocation of duties between judge and jury. Only a few writers focused on the problem—it seemed to go without saying. Of the pro-jury writers, Joseph Towers most effectively united the themes of distrust of

government and the jury's right to decide the allocation-of-duties question raised by the seditious libel doctrine:

It would, perhaps, be as unreasonable, that kings should be suffered themselves to determine the bounds of their own prerogative, as that judges should be permitted finally to decide, when the point in contest is, what is the extent of their own jurisdiction, and what is the extent of that of juries.⁹²

Thus, much, if not most, of the literature proclaiming the jury's right to find law as well as fact was concerned with the problem of the allocation of duties between judge and jury. Though many tract writers seem not to have realized it, this conceptualization of the problem hid important disagreements on the law itself. Many writers assigned as facts for the jury matters that the bench did not consider at all relevant. Nonetheless, for many opponents of the official doctrine the claim regarding jury law finding was simply an exhortation to jurors that they insist that certain questions were matters of fact rather than matters of law. Once the jury had claimed the question for its own, it would merely find the fact, in seditious libel as in other cases.

In the years following *Rex v. Franklin*,⁹³ the assertion that seditiousness was purely a question of fact became quite common. Pro-jury writers argued that, at one level, the question of the seditiousness of the writing could be reduced to the question: Had the writing "scandalized" the government? But what test should the jury apply when making this assessment? The proponents of free speech and press and of the trial jury insisted that mere evidence of negative criticism was not sufficient, that a writing was not criminal unless, at the very least, measurable harm was its probable result.⁹⁴ Some characterized the test as more complex still. Robert Morris thought it should be "[t]he purport of expressions, the tendency to sedition, the infamy, the reproach of language"; that, he said,

“can never so well be decided as by the common class of mortals to whom the publication is made. Who [is] more interested than juries (for juries are composed of the people) to preserve the peace and order of the state? . . . Juries are a tribunal ever changing as the times; they judge of men’s writings and actions by what they see and feel.”⁹⁵ The decider of fact, George Rous asserted, sounding a theme dear to the hearts of the Wilkites, “must enter into common life . . . must attend to the politics of the day . . . must imbibe the sentiments of the people. . . . Juries taken by lot . . . are peculiarly the proper judges in cases of libel.”⁹⁶ The determination that must be made, wrote Joseph Towers, required practically no knowledge of the law; the allegedly seditious publications were “generally addressed to men of all professions, and such of them as can be understood only by lawyers, are not very likely to produce tumults or insurrections.”⁹⁷ Highmore developed the same theme: If one argues that a libel is dangerous because it might arouse the common people, then one assumes that the people understand the writing and therefore must be qualified to be jurors, to determine whether a writing is, in fact, likely to arouse. “No man ever wrote, or read, sedition, but he knew that it was so: and this, without a little more knowledge of the law than is amply sufficient to answer all the purposes of his civil capacity as a citizen.”⁹⁸ Here, where pro-jury writers referred specifically to the kind of fact finding they believed relevant to the matter of seditious libel, they frequently drew attention to the jury’s daily assessment of the element of provocation in cases of homicide.⁹⁹ It is possible that some pro-jury tract writers, in their attempts to portray seditiousness as a question of fact as in other cases, were induced to concede more than they otherwise might have. They were led to define seditiousness in terms of a writing’s tendency to arouse, its impact on others, especially on the class of common people from which jurors were typically drawn. Some writers seem at times to have turned their attention from the question of the truth,

or of the intrinsic value, of the criticism, matters that were less easily portrayed as matters of fact within the competence of the average jury.¹⁰⁰

At yet a second level, most writers insisted that proof of scandal did not suffice to establish true seditiousness. There had also to be a finding of intent to scandalize—true criminal intent—indeed, true malice.¹⁰¹ This, too, was at times portrayed as a matter of pure fact finding in terms with which we are now familiar. What words were intended to mean, said Morris, was a factual, hence a jury, question;¹⁰² though establishing that meaning, as Francis Maseres argued, required the jury to draw inferences from facts, those inferences were “secondary” facts, which required “common sense, not technical learning.”¹⁰³ Juries were especially qualified in cases of libel since they knew “street talk”¹⁰⁴ and could draw the proper inferences. As another writer put it: a “jury of common coffee-house politicians in London” was best qualified to determine the fact of whether words were meant to be scandalous.¹⁰⁵

In most tracts, however, the discussion of criminal intent moved well beyond the immediate issue of seditious libel. Here, more than at any other point, writers looked to the role of juries in common-run felonies. Traditionally, juries assessed guilt or innocence largely on the basis of the intent with which an act had been committed. It was within this assessment that the jury, consciously or otherwise, had always applied its own standards of justice, weighed intent and conduct (and perhaps reputation) against the prescribed sanction.¹⁰⁶ By ruling that criminal intent would be inferred by the bench from the writing itself, the bench threatened the more modest but ancient law-finding tradition and, hence, the values that the right to jury trial had long epitomized.

The pro-jury writers’ inability consistently to maintain the idea—ought one say, the tactical stance?—that the question of intent could be reduced to a purely factual matter is reflected in their constant analogizing to the jury’s role in homicide

cases. In homicide cases, as many tract writers pointed out, the bench drew the jury's attention to the differences among malice aforethought, sudden deliberateness, unintentional homicide, and intentional but justifiable homicide, and thereupon left the matter to the jury.¹⁰⁷ The homicide analogy was in fact cited to prove that juries had the right to apply law to the facts. It was this traditional law-applying role that the bench was attempting to remove in seditious libel cases, or so many pro-jury writers charged.¹⁰⁸ Thomas Leach, extrapolating from homicide to "all other cases of crime"—by which he meant seditious libel—declared:

On indictment for murder, the jury decide, not only that the person, charged to have been murdered, did die, in consequence of the act of the defendant, and that such act resulted from a design to kill; which are matters of fact: But they also decide, whether from the particular circumstances, attending the homicide, it is to be ranked in that class, which the law justifies or excuses; or whether from the degree of criminal intention in the defendant it comes within the legal definition of the crime of manslaughter; or amounts to murder, which, if the intention of the libeller be matter of law, are evidently also matters of law.¹⁰⁹

For Leach, as for so many others across the half-century of active debate, the homicide analogy provided the basic model. Did the defendant strike (did he publish); did the blow cause death (did the writing scandalize); were the blow and death (or the scandal) intended and, if so, was there true malice or was the act justified or excusable? There was bound to be occasional disagreement between judge and jury on what constituted one or another degree of malice, on the limits of justification and excuse, or on their application to a given case. That was often true in homicide and it was certain to be true in seditious libel. The centuries-long tradition of allowing the jury leeway in its application of the law of homicide appears to have colored assumptions about the appropriate judge-jury role in

sedition libel.¹¹⁰ And just as disagreements between judge and jury on the law of homicide were conceptualized as disagreements merely about application of law to fact, so were such disagreements conceptualized by many opponents of the official doctrine of seditious libel.

6

The claim that the jury's inalienable role was that which they played daily in routine felonies—the application of the law that had been set forth by the bench—lay at the core of the attack on the law of seditious libel. The true law-finding issues of the debate—the jury's capacity to comprehend the law sufficiently to determine whether the judge had chosen apt precedents or had interpreted the relevant common law or statutes correctly—would continue to attract great attention, but the more routine discussion of whether the jury had the right merely to apply the law in seditious libel “as in other cases” was perhaps a more important aspect of the debate. When the pro-jury writers addressed this most basic level of “law finding,” they revealed something of their conception of the nature and purpose of the jury trial in all criminal cases.

It is important to remember that, in practice, the criminal trial had always been person- (as well as act-) oriented. Assessment of the defendant's character had traditionally affected the jury's view of his just deserts.¹¹¹ Character and credibility of course bore on the question of whether the defendant had committed the act alleged in the indictment, and in that sense the jury found the facts that it was charged to find. This observation was contained in *The Doctrine of Libels and the Duty of Juries fairly stated*, published in 1752:

[I]f from the character of the person libelled they think they have reason to believe, that he has been guilty of those facts, and that from the character of the person accused of libelling they

have reason to believe [the defendant] would not have charged any man with such facts unless he had known him to be guilty, they ought to bring their verdict Not Guilty. . . . This is a latitude which every jury ought to take, and a latitude which will be of great importance for every man to endeavor to preserve a good character in his neighborhood.¹¹²

This "latitude" was implicit in every jury trial. Thus George Stanhope in his sermon entitled *The Duty of Juries*, which was delivered in 1701 at the Lent Assizes, conceded that in close cases,

we may allow some abatements for a criminal action alleged against a person unblameable for the main, and impute it to ignorance, or sudden transport or passion, or misadventure, rather than to malice and wicked design; which abatements cannot fairly be allowed to those abandoned wretches, who are scandalous for mischievous dispositions and a profligate conversation.¹¹³

The problem was how to delineate between appropriate and inappropriate "abatements." That depended upon the sufficiency of the proof offered at trial, of which juries were without dispute the final judges. The official doctrine of seditious libel avoided this assessment entirely. The only facts left to the jury were so fully proved as to be virtually undeniable, and there was in any case nothing to balance against them, since intent was "implied" as a matter of law. What the opponents of the official law were demanding was the return to the jury, as a question of fact or of application of law to fact, of the complicated, intensely social question of criminal intent.

The seditious libel literature often assigned to the jury an even more open-ended role than the above discussion of criminal intent suggests. Fundamentally, according to pro-jury writers, whether in prosecutions for seditious libel; homicide, theft, or any other criminal offense, the defense of the

(truly) general verdict amounted to the defense of the defendant's right to a "merciful" judgment by peers. And "mercy" might be appropriate even in cases where the defendant was guilty under the law. The core of the power to decide "law as well as fact" was the jury's right to nullify the law in particular cases without rejecting it as a general matter.

That the English criminal law was a "merciful" law was a cliché in the eighteenth-century literature.¹¹⁴ The identification of the jury with mercy operated on two levels. Most writers, referring to the fact-finding process, asserted that, as Towers put it: "Where the matter is doubtful, in criminal prosecutions, an acquittal is always most consonant to the spirit of the law of England."¹¹⁵ Hinting at a yet broader role for the granting of mercy, Highmore observed: "[T]he jury know that by their verdict alone, and not by the knowledge of law in the judge, the prisoner at the Bar must be acquitted or suffer death."¹¹⁶ As in the capital felonies of murder or theft, he implied, so in the noncapital high misdemeanor of seditious libel. Morris drew an analogy to the royal power of pardon: "Like the king in the extension of mercy [the jury] make so noble a use of their power when their consciences permit them to acquit."¹¹⁷

In his *Address to the People of Scotland*, William Smellie described this second, commonplace, and ultimately more significant aspect of the jury's application of mercy. Commenting upon the statutory extension of jury trial to Scotland, and borrowing the terminology of the English seditious libel debate, he asserted:

If, therefore, the power of judging of the law as well as the fact, were annihilated, the very intention of the legislature would be defeated; because the courts, and not the jury, would then be the sole judges. Intention is the essence of crimes. The facts [charged] may be distinctly proved. But, if from particular circumstances, the jury are convinced in their own minds, that the [defendant] either had no intention to commit a crime, or that

the crime is not of so heinous a nature as to merit the punishment concluded for in the indictment, in all cases of this kind, the jury have not only a right, but they are bound, by the spirit of their oaths, and by the laws of God and man, to find the [defendant] Not Guilty of the crime. . . . They consider the nature of the crime, and the punishment that ought or ought not to be inflicted. In *all* such cases, the jury must necessarily determine both the law and the fact.¹¹⁸

Finding "law as well as fact," applying law to fact, or rendering a merciful verdict amounted to assessing the nature of both the defendant's intent and his act in the light of the punishment that would follow upon his conviction. The jury might approve of the defendant's behavior, as in some political cases, or might disapprove of it but deem the prescribed punishment too severe, as in some common-run felonies. Very different underlying motives, to be sure, but nonetheless, at least within the confines of some jury tracts, the fusion of jury theories was complete.

7

Fox's Libel Act marked a triumph for those whose concept of the English constitution was grounded in history. It vindicated the historic role of the jury as the last line of defense against executive tyranny. Although precedent could be found for treating seditious libel as an anomaly, the prior official doctrine nonetheless seemed to many a dangerous departure from deeply held assumptions about English governance.

At one level Parliament's concern was with the law. Fox's Act was couched as a declaration of the common law, resting less on specific precedent than on general principles of that law.¹¹⁹ Parliament looked first to the law regarding criminal trials generally. That law was assumed to govern; exceptions would be tolerated only where that law itself provided compel-

ling reasons for them. Parliament's solution to the seditious libel problem was also the result both of politics and of the nearly irresistible force of broad constitutional principles. The pressures from the expansion of rights of speech and press were enormous.¹²⁰ Those rights might still be limited (few questioned the appropriateness of punishment for truly seditious writings), but they could not be reined in through what appeared to society at large to be a drastic revision of the historically vindicated balance of power between judge and jury. Retreat to the technical high ground of "questions of law" served only further to expose the government to attack by the opposition. In manipulating the balance of authority at trial, the government—or so it was seen—was manipulating the institution through which it had historically ruled and on which it rested its claim to legitimacy. Having administered the law largely with the aid of the jury (one is tempted to conclude), the Crown and courts found they could not now govern mainly through the bench.¹²¹

To appreciate the way in which the government was captured by its own administrative history, we must recognize how little England's rulers controlled the circumstances that made law finding, or discretionary fact finding, a dominant element in the administration of the criminal law. For the most part, prosecution for felony, though privately initiated and joined by the government, proceeded in accordance with the attitudes of society at large. The alliance between authority and mercy-granting juries reflected a mixture of wise policy, shared assumptions about justice, and acquiescence in the inevitable.¹²² We must be cautious about extending the argument that authorities manipulated the selective enforcement of the criminal law in order to secure the deference of those they ruled to the problem of the use of the criminal trial jury.¹²³ If we focus too narrowly on the administration of the criminal law in the eighteenth century, we obscure the question of the roots of the system of mitigation. These practices were histori-

cally the by-product of the criminal law in cases—thief and homicide—where frequently complainant, defendant, and jury were, relatively speaking, members of the same class.¹²⁴ In such cases, the Crown and the bench and their attendant officials had an interest in overseeing the maintenance of order, but often they played the role of referees who lacked the resources, time, or stake in the outcome to prevent the jury from reaching a verdict according to its own sense of justice. Moreover, these practices, which long predated the eighteenth century, reflected social attitudes that were not easily managed or always willingly tolerated. This is not to say that authorities failed to capitalize on these sources of potential weakness, consciously or otherwise. It is to say that, to the extent authorities reaped the benefits of governing through merciful justice, the interaction of rulers and ruled was complex and two-sided. In important ways, authorities prevailed at the behest of those they sought to rule.

Our study of the seditious libel debate suggests that in yet another, related respect we must modify our understanding of the political and social implications of eighteenth-century law enforcement. The two strands of theory regarding the jury's rightful role could not forever remain separate. Jury law finding in political cases could not be kept distinct from jury resolution in common-run felonies. In the popular mind at least, the strength and reach of the arguments against the seditious libel doctrine were almost certainly influenced by the nature of jury practice in common-run cases. Might it be that the same authorities who allowed juries to share the powers of mitigation in common-run cases found themselves by virtue of that policy on the defensive in prosecutions for seditious libel? If so, we must recognize that authorities sometimes reaped, not deference, but a bitter harvest largely of their own making. The irony is less striking than might at first appear: the policy of sharing powers of mitigation was, as we have seen, little more than acquiescence in practices authorities could not easily

have eliminated. Having (over the centuries) converted great weaknesses into moderate strength, England's rulers found that that strength had, after all, its natural limits.¹²⁵

It has been wisely observed that English authorities came to accept as binding certain concepts of due process in which they had cloaked their exercise of pure power.¹²⁶ Something akin to this phenomenon seems to have been at work in Parliament's resolution of the seditious libel crisis. The Libel Act debates reflected a consensus on one principle only, that the criminal trial jury should have a right to return a general verdict on all facts at issue. That principle was recognized as having long constitutional standing. To deny it (or seem to deny it) in trials for seditious libel was not only to offend that principle but to risk political fire for offending it precisely in those circumstances that suggested the worst sort of motives.¹²⁷

Many in Parliament, certainly as of 1770, were, as a matter of legal theory, persuaded by Mansfield's defense of the official doctrine of seditious libel.¹²⁸ Precedent and the uniqueness of seditious libel seemed to ground an exception to the general rule. What, then, doomed the exception? Constitutionalism and politics are rarely separable. Parliament responded to both without being able to isolate either. The principle of a right to a general verdict in all cases had come to be identified socially with the prevailing theories regarding the purposes of the criminal trial jury. The principle was accepted by some because they believed its rejection would appear wrongly to be a rejection of more general principles that all in fact accepted. It was accepted by others who would themselves have viewed a rejection in that way. At base—in seditious libel—was the historic role of the jury as a safeguard against tyranny. So long as that issue could be kept from being entangled with others, the sides might be clearly drawn. Much would depend upon whether one viewed the settlement of 1689 as having rendered the safeguard unnecessary. But it could not be kept separate. So long as there were many who distrusted the role of authori-

ties in seditious libel cases, the settlement would never be solely a matter of institutional framework as such. It would of course be a matter of the movement for free speech and of the liberties of subjects generally. No doubt that is how many members of Parliament saw the issue. But it would also be a matter of how society regarded the practice of institutions, of the very real importance of *de facto* powers, such as those of the jury in common-run felony cases. The idea that discretionary lay fact finding was central to the administration of justice had taken on a life of its own, and no part of that administration could be shielded from it. Authorities could not, as it were, “bifurcate” the practice of trial by jury. The same judges who tolerated, or even encouraged, mitigated verdicts in homicide or theft could not easily explain why juries ought to play so limited a role in seditious libel. Notions of consistency and coherence were integral to the late eighteenth-century conception of justice. Nothing could gainsay them, not even the attendant risk of more subtle forms of inconsistency and incoherence—that is, inconsistent jury verdicts—as the price of seditious libel law reform.¹²⁹

The recognition of the right of the criminal trial jury to return a general verdict resolved one immediate political problem, but it contributed little to the resolution of some other long-standing problems of the criminal law. One of the important side effects of the seditious libel controversy was its intensification of the prevailing social conceptions of the criminal trial jury. The magnification of those conceptions and their translation to the sphere of political misdemeanors may have affected the administration of the law generally and delayed the movement for reform of the law of sanctions.¹³⁰

It is possible, of course, that the seditious libel problem and its resolution only temporarily delayed, and then ultimately accelerated, the movement for reform of the law of sanctions. The penal reformers’ argument against jury law finding—that is, against merciful fact finding in common-run cases—lost

some of its appeal when the integrity of the jury system seemed to be threatened in political misdemeanors. Resistance to the bench involved a glorification of jury independence; criticism of juries on all fronts may have become unfashionable. But in the years following passage of the Libel Act, juries, as is well known, convicted more often than they had before in cases of seditious libel.¹³¹ The general verdict allowed the tenor of the times to affect decisions and reminded observers of the volatility of jury attitudes. In those years, the warnings of Mansfield, John Bowles, and others seemed to have been well taken:¹³² the defendant's security was at risk; no one could be certain how juries would "apply" the law. One obvious solution to the problem of the jury that convicted against the law was a fuller right of appeal. But for the time being, the uncertainty of the law produced by the general verdict in seditious libel cases may have made it easier for penal reformers to return to criticism of jury discretion in common-run cases. The solution there was not to do away with the general verdict—that matter had been placed beyond reach—but rather to achieve certainty of law and punishment through the unmitigated imposition of humane and moderate sanctions.

Thus, if the seditious libel crisis did delay, it did not destroy, the movement for reform of the law of sanctions. The constitutionalization of the general verdict raised the stakes for the penal reformers. Having reidentified the jury as the quintessential democratic institution in English society, Parliament would have to demonstrate definitively what eighteenth-century reform proponents had only suggested: that the prevailing practice of jury-based mitigation in routine felonies had grown to such proportions that it was making a mockery of the law. Nothing less would suffice before Parliament could reduce the jury's role as a mediator in common-run cases. Changes in jury trial would follow, rather than precede, changes in English attitudes toward the entire problem of the administration of the criminal law.¹³³

NOTES

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1. For example, William S. Holdsworth, *A History of English Law* (London: Methuen and Co., 1922-66), 10:672-96; Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass.: Harvard University Press, 1964), 88-175; Fredrick Seaton Siebert, *Freedom of the Press in England, 1447-1776: The Rise and Decline of Government Controls* (Urbana: University of Illinois Press, 1965), 269-75, 380-92; H. M. Lubasz, "Public Opinion Comes of Age: Reform of the Libel Law in the Eighteenth Century," *History Today* 8 (1958): 453-61; Robert R. Rea, *The English Press in Politics, 1760-1774* (Lincoln: University of Nebraska Press, 1963); John Brewer, "The Wilkites and the Law, 1763-74: A Study of Radical Notions of Governance," in *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries*, ed. John Brewer and John Styles (New Brunswick, N.J.: Rutgers University Press, 1980), 128-71.

2. This essay constitutes one part of a book-length study I am undertaking on the history of the English criminal trial jury, 1200-1800. In the book, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*, to be published by the University of Chicago Press in 1985, I shall elaborate upon many of the points discussed in this essay, especially those made in sections 1, 2, and 7. I have filled in some of the connections between the present study and the larger work in the footnotes to those sections. See especially notes 30, 35-37, 39-40, 125, and 129. The present study examines the arguments (and rhetoric) of the main pro-jury writers. It does not contrast that literature to the tracts and legal opinions in support of the

official doctrine of seditious libel (though much of the official position is revealed implicitly in the criticisms set forth in the pro-jury writings).

3. Holdsworth, *History of English Law*, 8:343.

4. *Ibid.*, 336-42, esp. 339.

5. Thomas B. Howell, *Cobbett's Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period . . .*, 33 vols. (London, 1809-26), 7:III-30 (1680). Hereafter abbreviated as *St. Tr.*; citations are to volume, column, and date of case.

6. *St. Tr.*, 7:925-32 (1680).

7. *Ibid.*, 12:183-434 (1688).

8. 32 Geo. 3, c. 60. Technically, criminal intent was not at issue in seditious libel. If the court found that the writing was seditious, it held that the defendant (constructively) intended the consequences of the act of publication. Fox's Act left the jury in a position where it could apply the judge's instructions on seditiousness; in the course of doing so, the jury was supposed to "imply" the requisite intent if it found the publication seditious. The jury was thus in a position to consider whether there had been actual intent—in that sense, the issue had been left to them—though to do so was to go against the instructions and, hence, against the Libel Act. (See text, last paragraph of section 1.)

9. "Act of Settlement, 1701," in *The Eighteenth-Century Constitution, 1688-1815*, comp. and trans. E. Neville Williams (Cambridge: Cambridge University Press, 1965), 59: ". . . judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them."

10. For an excellent discussion of the *Seven Bishops' Case*, see Philip Hamburger, "The Origins of the Law of Seditious Libel" (unpublished paper, 1983), 32-37. When published, Hamburger's work will greatly modify all earlier conclusions about the pre-1730 law of seditious libel. Hamburger argues that the doctrine received its crystallization between 1696 and 1706 at the hands of Chief Justice Holt, and that at the time of the Harris and Carr prosecutions (1680) it ap-

plied solely to written defamation of public officials (it is unclear to me whether this is true regarding the 1663 prosecution of Brewster, Dover, and Brooks [*St. Tr.*, 6:539ff.]); according to Hamburger, Carr's prosecution was, strictly speaking, for unlicensed printing (34-37). What I refer to as the "Stuart law of libel" is the set of doctrines that I believe were emerging in the period before the *Seven Bishops' Case* and that some Restoration tract writers understood (perhaps wrongly) to be the settled official doctrine. See my discussion of Hamburger's analysis of the 1660-95 doctrine in chapter 6 of my forthcoming book. As Hamburger demonstrates, Holt's modification of these doctrines toward the end of the Stuart period was substantial and of great importance, but these changes concerned the definition of libel, not the allocation-of-powers question. Holt did not place greater restrictions on the jury's fact-finding responsibilities than the major Restoration critics of seditious libel assumed were already part of the law. The response to the *Seven Bishops' Case* must be understood, at least in part, in the light of the assumptions made by earlier critics (principally, John Hawles; see nn. 13-14 below).

11. Mansfield, in the *Dean of St. Asaph's Case* (*St. Tr.*, 21:1040), espoused the commonly held point of view as follows: "Jealousy of leaving the law to the Court, as in other cases, so in the case of libels, is now, in the present state of things, puerile rant and declamation. The judges are totally independent of the ministers that may happen to be, and of the King himself" (emphasis added). Mansfield took the view that the opponents of the official doctrine sought to make an exception of the law of libel: in that case alone the jury would find law as well as fact. A similar view can be found in an unpublished manuscript, "Sketch of an answer to a Pamphlet, entitled 'Letter concerning Libels, Warrants and Seizures of Papers' " (British Library, Additional MSS 35,887, fols. 171ff.), probably written in 1765 in reply to the second edition of "Father of Candor's" famous work (see n. 100 below). As the present study makes clear, most pro-jury writers took the view that the jury was to find law as well as fact in libel, *as in other cases*. From their perspective, libel was currently an exception under the official doctrine, and ought not to be so.

12. *St. Tr.*, 17:625-76 (1731).

13. John Hawles, *The Englishman's Right: A Dialogue between a Bar-*

rist at Law, and a Juryman (London, 1732), iv–vii. Capitalization in quotations from eighteenth-century texts has been modernized throughout.

14. Hawles, *The English-mans Right. A Dialogue between a Barrister at Law, and a Jury-man* (London, 1680), 10–18.

15. *St. Tr.*, 18:1203–30 (1752). The special jury was employed in a wide range of civil and criminal cases, though not in felonies. Typically, in seditious libel prosecutions, special juries were drawn from a panel of persons of higher social and economic status than those on panels for ordinary juries. Their rank was by no means exalted. The jurors who tried Owen were described as follows: merchant, sugar-baker, linen-draper, draper, draper, grocer, hosier, grocer, oilman, merchant, merchant, grocer. No doubt authorities attempted to secure a jury that would defer to the bench on rulings of law, but authorities met with little success in seditious libel. Owen's jury was hardly alone in resisting strict application of the seditious libel doctrine. Contemporaries occasionally criticized the use of special juries in seditious libel cases, but surprisingly little attention was paid to the matter, perhaps because many defendants fared well at the hands of the middling sort who sat on special juries. I shall discuss the use of special juries in my forthcoming book. For the background to the special jury, see the recent, excellent account in James C. Oldham, "The Origins of the Special Jury," *University of Chicago Law Review* 50 (1983): 137–221.

16. *St. Tr.*, 18:1227–28 (1752): "Then, gentlemen, to show you how necessary it is to prove the intention; if there is an indictment preferred against a man for an assault, with an intention to ravish; the intention must be proved, or else the jury cannot find him guilty. The same of an assault with an intention to kill, if the intention is not proved, he must be acquitted. If he kills, and the intention is not proved, that is, if it is not proved that he killed premeditatedly and of forethought, it is but manslaughter. Therefore in the case before us, if that part of the information is not proved, that he published maliciously, etc., you must acquit him."

17. *Ibid.*, 19:982–1002, 1075–1138 (1763–70).

18. *Ibid.*, 20:803–68 (1770).

19. *Ibid.*, 895–922 (1770).

20. Ibid., 869-96 (1770).

21. *The Parliamentary History of England (Parliamentary Debates)*, ed. William Cobbett (vols. 1-12) and T. C. Hansard (vols. 13-36) (London, 1806-20), 16:1212-15. Citations are to volume and column.

22. Ibid., 1305-6, 1312ff.

23. Ibid., 1259ff.

24. *St. Tr.*, 21:847-1046 (1783-84).

25. William Jones, *The Principles of Government, in a Dialogue between a Scholar and a Peasant* (London, 1782), republished by William Shipley as *The Principles of Government, in a Dialogue between a Gentleman and a Farmer* (London, 1783).

26. *St. Tr.*, 21:1041-44.

27. Levy, *Legacy of Suppression*, 249ff.; Holdsworth, *History of English Law*, 10:688-96.

28. 32 Geo. 3, c. 60.

29. As it happened, juries proved all too inclined to convict in the years following passage of the Libel Act; see n. 131 below.

30. This transformation in the criminal law took place over a very long period. Anglo-Saxon kings exercised sole jurisdiction in certain very serious kinds of cases. The list of such "unemendable" offenses grew steadily in the century after the Conquest and the machinery employed for presenting and trying suspects that was embodied in the Assize of Clarendon in 1166 was probably in use during the reign of Henry I (1100-1135). For the Assize of Clarendon, see *Sources of English Constitutional History: A Selection of Documents from A.D. 600 to the Present*, ed. and trans. Carl Stephenson and Frederick G. Marcham (New York: Harper and Brothers, 1937), 76-80. See also Thomas A. Green, "The Jury and the English Law of Homicide, 1200-1600," *Michigan Law Review* 74 (1976): 416-20; and idem, "Societal Concepts of Criminal Liability for Homicide in Medieval England," *Speculum* 47 (1972): 686-89, and works cited therein.

31. For an excellent discussion of the role of the presenting jury, see Roger D. Groot, "The Jury of Presentment before 1215," *American Journal of Legal History* 26 (1982): 1-24.

32. Green, "Societal Concepts" (above, n. 30), 669-83; see also James B. Given, *Society and Homicide in Thirteenth-Century England*

(Stanford: Stanford University Press, 1977), 95–96; Barbara A. Hanawalt, *Crime and Conflict in English Communities, 1300–1384* (Cambridge, Mass.: Harvard University Press, 1979), 52ff., 253; Bernard McLane, “The Royal Courts and the Problem of Disorder in Lincolnshire, 1290–1341” (Ph.D. diss., University of Rochester, 1979), 103–15.

33. John H. Langbein, “The Origins of Public Prosecution at Common Law,” *American Journal of Legal History* 17 (1973): 313–35; James S. Cockburn, “Trial by the Book? Fact and Theory in the Criminal Process, 1558–1625,” in *Legal Records and the Historian*, ed. John H. Baker (London: Royal Historical Society, 1978), 60–79; John H. Baker, “Criminal Courts and Procedure at Common Law, 1550–1800,” in *Crime in England, 1550–1800*, ed. James S. Cockburn (Princeton: Princeton University Press, 1977), 15–17. See, generally, John H. Langbein, *Prosecuting Crime in the Renaissance* (Cambridge, Mass.: Harvard University Press, 1974), pt. 1; James S. Cockburn, *A History of English Assizes, 1558–1714* (Cambridge: Cambridge University Press, 1972), pt. 2.

34. Green, “The Jury and the Law of Homicide” (above, n. 30), 487–97.

35. Cockburn, *History of English Assizes*, 123. Cockburn states: “A display of judicial displeasure was usually sufficient to ensure the reversal of unacceptable verdicts; as a last resort Star Chamber could be relied upon to discipline severely an obstinate or delinquent jury.” The extant Star Chamber records leave the impression that merely “merciful” juries were rarely bound over. Star Chamber mainly investigated acquittals alleged to have resulted from bribes or favoritism. See my forthcoming book, chap. 4.

36. This is an especially complicated matter, and one about which we still know very little. It appears that the development of the bench’s capacity to monitor trial juries was gradual. Moreover, authorities employed that growing capacity where it seemed to them most important to do so. Failure to restrain juries in less important cases (albeit felonies) may have fostered the view among society at large that jury discretion was legitimate. This was most likely with regard to jury behavior in theft, where the bench encouraged partial verdicts through undervaluation of goods, perhaps in an attempt to

forestall an outright acquittal. Judicial acquiescence in jury law finding at quarter sessions, especially in relatively trivial cases, may have colored assumptions about what it was appropriate for jurors to take into account at the assizes, or vice versa. For a pioneering study of trial jury behavior at early seventeenth-century quarter sessions and assizes, see Cynthia B. Herrup, "The Common Peace: Legal Structure and Legal Substance in East Sussex, 1594-1640" (Ph.D. diss., Northwestern University, 1982), chap. 5. See also Joel B. Samaha, "Hanging for Felony: The Rule of Law in Elizabethan Colchester," *Historical Journal* 21 (1978): 763-82.

37. The Interregnum literature on the trial jury is briefly canvassed in Donald Veall, *The Popular Movement for Law Reform* (Oxford: Oxford University Press, 1970), 99, 103, 156-59. Veall does not analyze the two most important jury tracts of the period: John Jones, *Judges Judged Out of Their Own Mouthes* (London, 1650) and idem, *Jurors Judges of Law and Fact* (London, 1650). Jones developed Leveller ideas, current from at least 1646, in the light of John Lilburne's famous assertion at his 1649 trial that the judges were mere "cyphers" and the jurors his true judges of law as well as fact. These tracts are important guides both to Leveller political thought and to Leveller historical theories. For discussions of Leveller thought, see Wilhelm Schenk, *The Concern for Social Justice in the Puritan Revolution* (Westport, Conn.: Greenwood Press, 1975), chaps. 2-5; Christopher Hill, *Puritanism and Revolution: Studies in Interpretation of the English Revolution of the Seventeenth Century* (London: Mercury Books, 1965), 75-82; Barbara Shapiro, "Law Reform in Seventeenth-Century England," *American Journal of Legal History* 19 (1975): 294-97; Quentin Skinner, "History and Ideology in the English Revolution," *Historical Journal* 8 (1965): 151-78; Robert Seaberg, "The Norman Conquest and the Common Law: The Levellers and the Argument from Continuity," *Historical Journal* 24 (1981): 791-806.

In my forthcoming book I shall examine Jones's tracts and the meaning of Lilburne's jury-right claim. The Levellers (I use the term loosely to include true Levellers as well as others who shared their historical views and political theory) proposed a decentralized system of criminal trials, one that would be dominated by the middling folk of the hundred, not by the Westminster assize judges.

They may have taken their understanding of the role of the jury from practice at quarter sessions, or even at assizes, where in many cases the bench at least appeared to allow the local community to determine the outcome with a free hand.

Lilburne's 1653 trial occasioned a second outpouring of tracts on the criminal trial jury. For a description of the trial and references to some of these tracts, see Pauline Gregg, *Free-born John: A Biography of John Lilburne* (London: George G. Harrap, 1961), chap. 28 and pp. 394-96. Lilburne's writings reveal that by 1653 he had developed a more modest, but more powerful, argument regarding the jury's right to find law. This argument was adopted by the Quakers in their struggle with the Crown and bench, especially during the 1660s. The tracts occasioned by the Quaker trials and especially by the famous trial of William Penn and William Mead laid the basis for the Restoration and eighteenth-century theory of jury law finding. I shall discuss these post-1660 developments in chapter 6 of my forthcoming book.

38. For example, Hawles, *Englishman's Right*; Henry Care, *English Liberties: Or, The Free-Born Subject's Inheritance* (London, 1680); *A Guide to Juries, setting forth their Antiquity, Power and Duty, by a person of quality* (London, 1699).

39. The practice of fining jurors seems never to have become widespread. Much of the extant evidence of fining dates from the early 1660s and reflects judicial response to resistance to enforcement against the Quakers of the 1664 Conventicles Act. The most prominent justices who resorted to fining were Hyde, Twisden, and Kelyng. Perhaps emboldened by a decision in King's Bench in 1665 that fining was lawful (*Wagstaff's Case*), Kelyng threatened and actually fined grand and petty juries in several cases between 1665 and 1667 (for *Wagstaff's Case*, see *The English Reports*, 176 vols. [Edinburgh: W. Green and Sons; London: Stevens and Sons, 1900-30], 83:1328—hereafter cited as *Eng. Rep.*). In the latter year he was censured for his behavior by the House of Commons. See *The Diary of John Milward . . . September 1666 to May 1668*, ed. Caroline Robbins (Cambridge: Cambridge University Press, 1938), 159-70; *The Diary of Samuel Pepys*, ed. Robert Latham and William Matthews, 11 vols. (Berkeley and Los Angeles: University of California Press, 1970-83),

8:483-84, 494, 577; *Debates of the House of Commons, from the Year 1667 to the Year 1694*, comp. Anchitell Grey, 10 vols. (London, 1763), 1:62-64. Parliament did not declare fining unlawful; a bill that would have done so died in committee.

40. John Vaughan, *Reports and Arguments of that Learned Judge Sir John Vaughan, Kt.* (London, 1677), 135-58; *Eng. Rep.*, 124:1006-18. *Bushell's Case* marked the end of fining and imprisonment as means of coercion, although the bench almost certainly continued to "menace" jurors. It is important to note, however, that the bench had at its disposal means to steer juries in ways that were considered entirely appropriate. Though these means were probably used sparingly, they could be sufficient in particular cases. See John H. Langbein, "The Criminal Trial before the Lawyers," *University of Chicago Law Review* 45 (1978): 263ff.

41. *Eng. Rep.*, 124:1009, 1013. For a detailed analysis of Vaughan's opinion see chapter 6 of my forthcoming book.

42. *St. Tr.*, 6:951-1000 (1670): the trial of William Penn and William Mead.

43. See n. 14 above.

44. See, for example, Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750*, vol. 1 (London: Stevens, 1948), 138ff.; John M. Beattie, "Crime and the Courts in Surrey, 1736-1753," in *Crime in England*, ed. Cockburn, 155-86, esp. 174-83. See my forthcoming book, chap. 7.

45. Transportation was in use as early as the seventeenth century; its use became quite general after 1718. See Beattie, "Crime and the Courts" (above, n. 44), 158; Cockburn, *History of English Assizes*, 130; John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1977), 39-44, and works cited therein.

46. The seminal article taking this point of view is Douglas Hay, "Property, Authority, and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay (New York: Pantheon, 1975), 17-63. See also E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975), 245-69, for a thoughtful commentary on this perspective. For a critique

of Hay, and implicitly of the Hay school, see Langbein, "Albion's Fatal Flaws," *Past and Present*, no. 98 (1983): 96-120. Hay does not deal at length with jury-based mitigation.

47. For example, Brewer, "The Wilkites and the Law" (above, n. 1), 156-58.

48. Henry Fielding, *An Enquiry into the Causes of the late Increase of Robbers, &c. With some Proposals for Remedying the Growing Evil* (London, 1751); William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765-69), 4:4-5, 17-19, 390-91; William Eden, Baron Auckland, *Principles of Penal Law* (London, 1771), 1-12; Henry Dagge, *Considerations on Criminal Law* (London, 1772), xxvi, xxvii; Samuel Romilly, *Observations on a Late Publication, intituled, Thoughts on Executive Justice* [by Martin Madan] (London, 1786). For a discussion of this reform movement, see Radzinowicz, *History of English Criminal Law*, 1:301-50. Radzinowicz pays little attention to the reformers' views on the trial jury.

49. See my forthcoming book, chap. 7.

50. Thomas A. Green, Introduction to Blackstone, *Commentaries*, vol. 4 (Chicago: University of Chicago Press, 1979), ix-xi, and Blackstone, *Commentaries* (above, n. 48), 4:239.

51. For example, Blackstone, *Commentaries*, 3:379-81; Dagge, *Considerations on Criminal Law*, 124-25.

52. This view was expressed by Justice Willes in *Rex v. Shipley* (the *Dean of St. Asaph's Case*); see Sylvester Douglas, Baron Glenbervie, *Reports of Cases Argued and Determined in the Court of King's Bench, in the Nineteenth, Twentieth, and Twenty-first . . . Years of the Reign of George III*, 4 vols. (London: Reed and Hunter, 1813-31), 4:172.

53. For example, John Pettingal, *An Enquiry into the Use and Practice of Juries, among the Greeks and Romans; From whence the Origin of the English Jury may probably be deduced* (London, 1769), iv-ix.

54. For example, *Historical Sketches of Civil Liberty; From the Reign of Henry the VIIIth to the Accession of the House of Stuart; with an account of the antiquity, use, and duty, of juries* (London, 1788), 96-97.

55. For example, James Astry, *A General Charge to all Grand Juries . . . to which is prefix'd, a Discourse of the antiquity, power, and duty of juries* (London, 1703), 4; John Fortescue-Aland, ed., *The Difference between*

an *Absolute and Limited Monarchy*, by John Fortescue (London, 1719), 56n. See also Blackstone, *Commentaries*, 3:349–50.

56. Henry Burtenshaw, *Letters to the Right Hon. The Earl of Mansfield* (London, 1781), viii.

57. *Ibid.*, 79.

58. Blackstone, *Commentaries*, 4:344.

59. Dagge, *Considerations on Criminal Law*, 123–24.

60. *Ibid.*, 125.

61. *Ibid.*, 135.

62. William Paley, *The Principles of Moral and Political Philosophy* (London, 1785), 505.

63. Robert Morris, *A Letter to Sir Richard Aston . . . containing a reply to his scandalous Abuse [of Morris]; and some thoughts on the modern doctrine of Libels* (London, 1770), 40.

64. Paraphrase of Glynn's speech in *Bingley's Journal* (London), 21 July 1770, p. 3, col. 3. Glynn appears actually to have said: "For we all know, that in all times, the honest, intrepid, upright conduct of a jury must be the refuge of the people of this kingdom. . . . They must and will, in the natural course and evolution of things, flee again to the same asylum . . ." (*St. Tr.*, 20:880).

65. Thomas Leach, *Considerations on the Matter of Libel. Suggested by Mr. Fox's notice in Parliament of an intended motion on that subject* (London, 1791), 9.

66. Morris, *Letter to . . . Aston*, 56.

67. *Bingley's Journal*, 30 June 1770, p. 1, col. 2.

68. "Letter to be read by all Jurymen" (signed "Brittanicus"), 19, printed with *An Address to the Jurymen of London. By a Citizen* (London, 1752).

69. George Rous, *A Letter to the Jurors of Great Britain* (London, 1771), 50.

70. Manasseh Dawes, *England's Alarm! On the prevailing doctrine of Libels as laid down by the Earl of Mansfield* (London, 1785).

71. Capel Lofft, *An Essay on the Law of Libels* (London, 1785), 96.

72. Anthony Highmore, *Reflections on the distinction usually adopted in Criminal Prosecutions for Libel* (London, 1791), 33.

73. Rous, *Letter to the Jurors*, 10.
74. *Ibid.*, 60.
75. *Ibid.*, 61.
76. Dagge, *Considerations on Criminal Law*, 135. See Blackstone, *Commentaries*, 4:344.
77. Joseph Towers, *An Enquiry into the Question, Whether Juries are, or are not, Judges of Law, as Well as of Fact, with a particular Reference to the case of Libels* (London, 1764), 52.
78. *Address to the Jurymen of London*, 16.
79. *Bingley's Journal*, 23 June 1770, p. 2, col. 1.
80. See my forthcoming book, chap. 6.
81. For example, *A Treatise on the Right of Juries* (London, 1771), 16, 25, 39.
82. *Ibid.*, 15-16.
83. Douglas, *Reports*, 4:171: "Where a civil power of this sort has been exercised without control, it presumes, nay, by continual usage, it gives the right."
84. Leach, *Considerations on the Matter of Libel*, 8. See also Charles, Earl Stanhope, *The Rights of Juries defended, . . . and the objections to Mr. Fox's Libel Bill refuted* (London, 1792), 98-99.
85. Blackstone, *Commentaries*, 4:354.
86. Morris, *Letter to . . . Aston*, 48: "[W]here they are certain [of the 'operation of law'], they may and ought to take the determination upon themselves. The power juries most undoubtedly have, of determining, upon the general issue, both the fact and the law which arises out of that fact." Rous, *Letter to the Jurors*, 9; Dagge, *Considerations on Criminal Law*, 131.
87. *London Evening Post*, 21 June 1770, p. 3, col. 3; Stanhope, *Rights of Juries defended*, 128ff.
88. *Treatise on the Right of Juries*, 15.
89. *Ibid.*
90. *The Gazetteer and New Daily Advertiser* (London), 6 December 1784, p. 2, col. 2.
91. Cf. Joseph Towers, *Observations on the rights and duty of Juries*, in

trials for Libels (London, 1784), 42. But see the anonymously authored reply to Towers, entitled *An Examination into the rights and duties of Jurors; with some strictures on the Law of Libels. By a Gentleman of the Inner Temple* (London, 1785). The author admitted that the promulgation of comprehensible laws was a necessary reform project. But in the meantime, "The end of the laws is obedience: but who will obey them farther than it shall please himself, if every man be allowed to plead an ignorance, almost impossible to be disproved" (61).

92. Towers, *Observations on the rights and duty of Juries*, 29. In his reply to Towers, the author of *An Examination into the rights and duties of Jurors* asserted: "Where else shall we seek the boundaries, by which the authority of different courts is restrained, but in the solemn adjudication of the superior courts of justice" (69).

93. See n. 12 above.

94. Highmore, *Reflections on the distinction usually adopted*, 8ff.

95. Morris, *Letter to . . . Aston*, 42-43.

96. Rous, *Letter to the Jurors*, 51.

97. Towers, *Observations on the rights and duty of Juries*, 33.

98. Highmore, *Reflections on the distinction usually adopted*, 35.

99. See nn. 107-10 below, and accompanying text.

100. It is possible that most writers thought that three separate tests ought to be applied: the writing must be false; it must have a tendency to "arouse"; the defendant must have intended that the writing "arouse." Indeed, a fourth test may be implied: the defendant must have known that the writing was false. Few authors approached these questions systematically; the highly polemical character of the tracts leaves the impression that their authors would have required any or all of these tests, although they sometimes addressed one of them as though it were the "true" test. For an excellent discussion of "Father of Candor's" near rejection of the "bad-tendency" test, see Levy, *Legacy of Suppression*, 149-54. "Father of Candor" implied that true harm or injury ought to be required (*An Enquiry into the Doctrine, Lately Propagated, concerning Libels, Warrants, and the Seizure of Papers . . . in a Letter to Mr. Almon from the Father of Candor* [London, 1764], 20, 71). This position went beyond that taken by other writers, but it seems that (to the extent "Father of Candor" ac-

tually espoused it) it did not include statements that were “wilfully false” (48, 160).

101. For example, *Another Letter to Mr. Almon, in matter of Libel* (London, 1770), 31: The author states that the jury ought to acquit if the defendant acted “without any wicked intent.” He analogizes this to a finding that a defendant in homicide slew “without malice” and then continues: “[I]f the jury are convinced, that although [the defendant] wrote or printed and published [the work], he did so without traiterous, seditious, scandalous, or malicious intent, they ought to find him . . . not guilty. . . .”

102. Morris, *Letter to . . . Aston*, 42.

103. Francis Maseres, *An Enquiry into the Extent of the Power of Juries, on trials of indictments or informations* (London, 1785; originally published, 1776), 30–31.

104. Ibid.

105. *Another Letter to Mr. Almon*, 48.

106. See sec. 2 above. See Green, “Societal Concepts” (above, n. 30), *passim*.

107. For example, *The Doctrine of Libels, and the Duty of Juries fairly stated* (London, 1752), 14–15; *Another Letter to Mr. Almon*, 31; Towers, *Observations on the rights and duty of Juries*, 21.

108. For example, *Doctrine of Libels*, 14–15.

109. Leach, *Considerations on the Matter of Libel*, 7.

110. It is not surprising that pro-jury writers drew primarily upon common practices in homicide cases rather than upon such practices in prosecutions for theft, which accounted for most of the business of the assize courts. In the case of theft, mitigation operated typically as an open means of commuting the death sentence in favor of defendants who had clearly committed the act with which they had been charged. It is true that it was also employed where the evidence was doubtful, but that too was a function of the desire to use execution only sparingly. The thief’s behavior was viewed as premeditated and insidious, virtually always as reprehensible, rarely as excusable. It is true that in most cases, especially where there had not been physical violence, the act itself was deemed by many as not meriting capital punishment. Moreover, the thief’s behavior was often seen as in part

the product of social conditions; it was hoped that the thief might be reformed. But the thief's behavior was viewed nonetheless as intrinsically evil.

Homicide presented a more complex problem. Although the taking of a life had always been viewed as a particularly serious matter, the defendant's intent could be very evil or fully justified or something in between. It might be (and often was) excusable under the law. Thus, while in some homicide cases verdicts of self-defense, accident, or manslaughter served to mitigate the law of sanctions in favor of defendants whose acts were nonetheless viewed socially as evil, as they nearly always were in theft, in many other homicide cases such verdicts reflected a very different social response: the behavior of the true self-defender was fully accepted. And like the true self-defender (the notion ran), the true "public defender" (i.e., the alleged libeler) deserved at least vindication, if not approbation.

The homicide analogy was also attractive because the nature of the jury's resolution was often hidden from view, perhaps even from the conscious understanding of the jurors themselves. It was a process around which myths might grow. Eighteenth-century commentators could suppose that jurors in homicide trials were engaged mainly in a subtle assessment of the defendant's intent at the time he committed the homicide in question. The juror's consideration of the defendant's reputation and character might be assimilated to their determination of the defendant's intent. This consideration need not be understood as the largely separate matter that all contemporaries knew it was in theft cases, where more often than not reputation and character influenced the jury mainly in its "sentencing" role.

Finally, opponents of the official doctrine of seditious libel were greatly influenced by Hawles, who, as we have seen, cited the jury's right to decide among the various kinds of homicide verdicts as evidence of their right to decide law as well as fact. Through Hawles, and perhaps without realizing it, eighteenth-century writers reached back to the parliamentary censure of Chief Justice Kelyng in 1667 (for his treatment of juries, mainly in homicide cases, see n. 39 above) and, ultimately, to the *de facto* practices of medieval juries. The daily practice in cases involving theft conditioned attitudes regarding the role of mercy and the right of the jury to share assess-

ment of just deserts. But it was the jury's role in homicide cases that allowed the strongest, most acceptable, and best-documented argument for the jury's right to "apply" the law within the "factual" assessment of whether the defendant had acted with a truly criminal intent.

III. See Beattie, "Crime and the Courts" (above, n. 44), 173-74, 179, for a discussion of the impact of reputation and character on verdicts in the eighteenth century. These considerations were influential also at the reprieve and pardoning stages. It is likely that judicial and royal attitudes influenced those of trial jurors, and vice versa. Indeed, this dialectical pattern of influence was probably present from the beginning of trial by jury.

112. *Doctrine of Libels*, 10.

113. George Stanhope, *The Duty of Juries* (London, 1701), 12. Stanhope added: "But still . . . these are but probabilities and presumptions and must come in their proper place. For where they are admitted to over-balance credible and fully peremptory proof, there we offend against the Text (i.e., Levit., XIX, 15) and have respect of persons in judgment" (ibid.).

114. For example, [John Rayner?], *An Inquiry into the Doctrine, Lately Propagated, concerning Attachments of Contempt* (London, 1769), 40-41; *Treatise on the Right of Juries*, 42; Paley, *Principles of Moral and Political Philosophy*, 522.

115. Towers, *Observations on the rights and duty of Juries*, 109-10.

116. Highmore, *Reflections on the distinction usually adopted*, 26.

117. Morris, *Letter to . . . Aston*, 40.

118. William Smellie, *An Address to the People of Scotland on the Nature, Powers and Privileges of Juries* (Edinburgh, 1815; originally published 1784), 13-15.

119. 32 Geo. 3, c. 60 (1792). For the debates on the form that the act ought to take, see Hansard, *Parliamentary History*, 29:551-602 (Commons), 726-42 (Lords), 1036-47 (Lords), 1293-1300 (Lords), 1361-71 (Opinions of the Judges), 1404-31 (Lords), 1534-38 (Lords). The act began: "Whereas doubts have arisen whether . . . it be competent to the jury . . . ; be it therefore declared and enacted . . ." Holdsworth (*History of English Law*, 10:690) accepts the view that the

act was couched in declaratory form in order to suggest that the courts had been mistaken in their view of the preexisting law.

120. Holdsworth, *History of English Law*, 10:672-74. Holdsworth believes that the judges were in fact correct in their statement of the law but that "it was clear that the law as laid down by the judges was quite out of harmony with the practical ideas and public opinion of the time" (674). Levy (*Legacy of Suppression*, 249-52) briefly discusses the tract campaign that preceded the passage of Fox's Libel Act.

121. This conclusion is necessarily tentative; I shall develop it further in my forthcoming book. I have stated the point broadly, and mean it to have wide reference, but it may be that it applies mainly to the disparity between the treatment of routine cases on the one hand and seditious libel on the other, and that contemporaries viewed that disparity as an isolated phenomenon.

122. See sec. 2 above.

123. See n. 46 above.

124. Langbein, "Albion's Fatal Flaws" (above, n. 46), 107. But see Douglas Hay, "War, Dearth, and Theft in the Eighteenth Century: The Record of the English Courts," *Past and Present*, no. 95 (1982): 154 n. 100. There is need for more research on this matter. My essential point is that, whatever the status difference between suspects and their accusers, the status difference between accusers and the bench was frequently far greater. Moreover, accusers and accused were typically from the same locale; judges oversaw local disputes to which they were themselves outsiders, both geographically and socially. This was probably as much or even more the case in earlier centuries. So long as jurors typically took their lead from the bench, the bench countenanced substantial leeway in less serious cases. And even when jurors took their lead from the bench, they were responding to judicial attitudes that were themselves in part the reflection of long-held and widely shared community standards.

125. I have made this argument in the present essay with respect to the administration of criminal law in the eighteenth century. I believe that it applies as well to earlier periods. Judges in the medieval period may have sensed that their relaxed treatment of juries in most cases made it difficult for them to control juries in those few cases in which they took a real interest. The early modern bench may have

analyzed the resistance to fining jurors in similar terms. The phenomena I am describing were present from the outset of the jury trial experience. The contest over the doctrine of seditious libel was of special importance because it involved widespread political debate and revealed the limits of authority during the very period in which authority was (ostensibly) coming to have relatively substantial control over the administration of criminal law.

126. Thompson, *Whigs and Hunters*, 158–69: “And the rulers were, in serious senses, whether willingly or unwillingly, the prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away” (263). See also Hay, “Property, Authority, and the Criminal Law” (above, n. 46), 32ff.

127. For references to the Libel Act debates, see n. 119 above.

128. See n. 23 above.

129. Mansfield, in *Rex v. Shipley* (*St. Tr.*, 21:1040), stressed the problem of inconsistent verdicts: “To be free, is to live under a government by law. . . . Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, or, which is the same thing, no certain administration of law to protect individuals, or to guard the state. . . . In opposition to this, what is contended for? That the law shall be in every particular cause what any twelve men . . . shall be inclined to think, liable to no review, and subject to no control. . . . Under such an administration of law, no man could tell, no counsel could advise, whether a paper was or was not punishable.” See also John Bowles, *Considerations on the Respective Rights of Judge and Jury, particularly upon Trials for Libel, occasioned by an expected motion of the Right Hon. Charles-James Fox* (London, 1791), 4: “It would be next to impossible that [the jurors’] decision should accord with any uniform and fixed principles. The consequence would be, the prevalence of confusion and uncertainty in all legal proceedings where intervention of a jury takes place. A total loss of freedom must of course ensue; for the essence of freedom consists in the certainty of law.”

130. This is, of course, a matter of speculation. Doubtless, many factors delayed the impact of the criticisms of the late eighteenth-century reformers. I plan to return to this problem in future research.

131. Holdsworth, *History of English Law*, 10:693; Levy, *Legacy of Suppression*, 252–54. Both Holdsworth and Levy rely heavily on Stephen's account of the aftermath of the act. See Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, 3 vols. (London: Macmillan and Co., 1883), 2:362–63.

132. See n. 129 above.

133. In chapter 9 of my forthcoming book I shall survey the early nineteenth-century developments that resulted in changes in the role of the criminal trial jury.